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Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

WILLIAM D. SCHEID AND DAN E. MILLER,

*Petitioners*,

v.

ABRAHAM B. GOLDBERG,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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36 pp

## QUESTION PRESENTED FOR REVIEW

Whether an order of the Court of Appeals for the Tenth Circuit invalidating an order entered by a magistrate judge in post-judgment proceedings referred by the district court pursuant to 28 U.S.C. § 636(b)(3), because such order was not reviewed or approved by a district judge, notwithstanding that the Respondent did not object to the reference to a magistrate or to the order, conflicts with *Peretz v. United States*, 501 U.S. 923 (1991) and *United States v. Raddatz*, 447 U.S. 667 (1980).

## PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Parties to this proceeding are, William D. Scheid and Dan E. Miller as successors to the entire interest of Appellee below, Securities Investor Protection Corporation ("SIPC"), Petitioners, and Abraham B. Goldberg, Respondent.

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## CITATIONS TO OPINIONS AND ORDERS

The May 30, 2002 Order and Judgment of the Court of Appeals reversing the Order of the District Court of March 8, 2001 is not published and appears beginning at page 1a of the Appendix.

The June 21, 2002 Order denying Petitioner's motion for panel rehearing is not published and appears beginning at page 13a of the Appendix.

The March 8, 2001 Order of the United States District Court for the District of Colorado affirming the Magistrate Judge's November 10, 1998 Order is unpublished but appears beginning at page 9a of the Appendix.

The November 10, 1998 Order of the Magistrate for the United States District Court for the District of Colorado appears beginning at page 11a of the Appendix.

## BASIS FOR JURISDICTION OF THIS COURT

(i) The order and judgment of the United States Court of Appeals for the Tenth Circuit issued on May 30, 2002.

(ii) The Circuit Court denied a timely petition for rehearing on June 21, 2002. This Petition is filed within 90 days of the June 21, 2002 order.

(iii) Inapplicable.

(iv) Petitioner suggests that 28 U.S.C. § 1254(1) confers jurisdiction upon the Court in proceedings regarding this Petition.

## STATUTES AND RULES INVOLVED IN THIS CASE

1. Federal Magistrates Act, 28 U.S.C. § 636(a) and (b) is found in the Appendix beginning at page 15a.

2. Rules 72 Fed.R.Civ.P. is found in the Appendix beginning at page 18a.

3. D.C. Colo. LR 72.3(D) is found in the Appendix beginning at page 22a.

4. Rule 54(h) Colo.R.Civ.P. is found in the Appendix beginning at page 20a.

5. Colo. Rev. Stat. 13-52-102(2)(a) is found in the Appendix beginning at page 21a.

## A CONCISE STATEMENT OF THE CASE

This case arises out of a proceeding in the District Court for the District of Colorado for the liquidation of defendant Institutional Securities of Colorado, Inc.("ISOC"), a securities broker-dealer registered with the Securities and Exchange Commission. The case was filed and the liquidation was conducted pursuant to Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78lll. Respondent, Abraham B. Goldberg was the principal officer of ISOC. The Trustee appointed by the Court (the "SIPA Trustee") obtained a judgment, in the bankruptcy court, against Respondent based on Respondent's fraud upon ISOC customers. That judgment was entered by the District Court on December 13, 1978 in the sum of $187,779.38 After cross appeals by the SIPA Trustee and Respondent from the bankruptcy judge's ruling, the sum owing was increased by $169,600 by judgment entered in the District Court on July 21, 1982. SIPC held the judgment obtained by the SIPA trustee pursuant to the final decree in the liquidation case until it was assigned to Petitioners post appeal.

Colorado law provides by Statute (C.R.S. §13-52-102(2)(a)) coupled with Rule 54(h), Colo.R.Civ.P. that judgments may be enforced for a period of 20 years after entry and that the life of the judgment may be revived, if unpaid to any degree, by additional 20 year periods by orders entered prior to the end of any applicable 20 year period. Under Rule 54(h), Colo.R.Civ.P., if a judgment is not timely revived the judgment is deemed to have been paid in full.

On May 29, 1998 SIPC filed a motion in the District Court to revive the judgments entered by that court on December 13, 1978 and July 21, 1982. Post-trial matters are, and the motion was, referred to the magistrates by Local Rule 72.3(D) and the Federal Magistrates Act, 28 U.S.C. §636(b)(3) with no objection by Respondent. SIPC's motion to revive the

judgments was contested by Respondent and the issues were heard and determined by a magistrate judge. After a hearing, the magistrate issued the Order of November 10, 1998 granting SIPC's revival motion. Respondent made no objection to the November 10, 1998 order. There have been no challenges to the notice or other procedural requirements involved. SIPC did not seek confirmation of the order from the District Court. The District Court judge did not sign the order.

Respondent's challenge to the magistrate's November 10, 1998 order came approximately 27 months later. On February 7, 2001 Respondent filed a motion in the District Court for a declaration that the magistrate judge lacked authority to revive the judgment and that the revival order was invalid. Because revival orders must be entered before the judgment to be revived is 20 years of age, Respondent asked for a declaration that the Judgment could not, any longer, be revived. SIPC responded to the motion and the District Court denied Respondents motion, finding:

> It is clear from the record that United States Magistrate Judge Bruce D. Pringle complied with the requirements of Rule 54(h) of the Colorado Rules of Civil Procedure. Accordingly, the only issue is his authority to enter the final order. Pursuant to 28 U.S.C. § 636(b), Fed.R. Civ.P.72 and D.C.Colo.L.R.72, the revival motion was appropriately referred to Magistrate Judge Pringle and in the absence of any timely objection to his ruling the order became final within the twenty year period provided by Colorado law.

App. at 10a.

Respondent appealed. SIPC moved to dismiss the appeal based upon the firm waiver rule adopted by the Court of Appeals in *Moore v. United States*, 950 F.2d 656, 659 (10th Cir.1991), which as to cases other than pre-trial dispositive determinations (28 U.S.C. § 636(b)(1)(A), "provides that the failure to make timely objections to the magistrate's findings or recommendation waives appellate review of both factual and legal questions." A very similar rule was approved by the

Court in *Thomas v. Arn*, 474 U.S. 140 (1985). SIPC's motion to dismiss was referred to the panel. After briefs were filed the Order and Judgment reversing the District Court was entered. App. at 1a[1]

The Court of Appeals held that the "Order" of a magistrate was instead a "recommendation" because the Local Rule permitting the magistrate to "hold hearings on substantive issues does not permit the magistrate judge to issue final orders on substantive issues." App. at 6a. The Rule itself, does not require the District Court to do anything; the holding was predicated upon the requirements of Rule 72(b), Fed.R.Civ.P. and compared to a Tenth Circuit holding that a magistrate does not have power to enter a final appealable (to the Circuit Court) order in a post-judgment dispute among competing creditors of the judgment debtor without the creditor's express consent. *Colorado Bldg. & Const. Tr. Coun. v. Anderson Const.*, 879 F.2d 809 (10th Cir. 1989).

The Order and Judgment disposed of the SIPC's motion to dismiss under the "firm waiver rule" on two grounds. First, that the firm waiver rule was inapplicable because Respondent did not appeal from the magistrate's 1998 order; his appeal was from the District Court's order in 2001. Secondly, that, "Where the District Court has not acted to adopt, reject or modify a magistrate judge's recommendation or non-final order under Rule 72(b), however, the result is simply that there is no final judicial action." App. at 7a.

The basis for Federal jurisdiction in the District Court: 15 U.S.C. § 78eee(b)(2); 15 U.S.C. § 78aa; and 28 U.S.C. § 1131.

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[1] The court of appeals suggested (App. at 7a) that an order entered prior to the 20th anniversary of the amended judgment of July 21, 1982 reviving the judgment might extend the life of the judgment. Prior to the assignment of its interest to Petitioners, SIPC filed a second revival motion, which was denied by the district court and is on appeal to the court of appeals.

## REASONS FOR GRANTING THE WRIT

**The Holding of the Court of Appeals That the Magistrate Judge's Post-trial Ruling Under 28 U.S.C. § 636(b)(3) is Invalid for Lack of a Signature of a District Judge is in Conflict with the Holdings of This Court in *Peretz v. United States*, 501 U.S. 923 (1991) and *United States v. Raddatz*, 447 U.S. 667 (1980).**

### I. Introduction

In both this case and *Peretz v. United States*, 501 U.S. 923 (1991) ("*Peretz*") matters pending in the District Court were referred to a magistrate pursuant to 28 U.S.C. § 636(b)(3). *Peretz* arose in a criminal context and this case is civil. But that criminal/civil dichotomy is a distinction without a difference. The issues adjudicated in *Peretz* regarded the requirements of Article III of the Constitution. In both cases, the same protections are at issue. In each case the defendant failed to object to the reference to the magistrate and failed to object to the order of the magistrate.

### II. Misreading *Peretz*, the Court of Appeals Held that Rule 72(b) Fed.R.Civ.P. Invalidated the Magistrate's Order

In its Judgment and Order the Court of Appeals first held that the Respondent's appeal was not from the magistrates order but rather from the District Court order holding that order effective. App. at 7a. The Judgment and Order then stated:

> Second, Goldberg's failure to seek review of the magistrate judge's order pursuant to Fed.R.Civ.P. 72 did not create a final, binding order reviving the judgment in this case. We recognize that the party can waive his right to have a matter determined by an Article III judge. *See*, *Peretz v. United States*, 501 U.S. 923,936-39 (1991); *Clark v. Poulton*, 963 F.2d 1361, 1367 (10th Cir. 1992). Where the district court has not acted to adopt, reject or modify a magistrate Judge's recommendations or non-final

> order under Rule 72(b), however, the result simply that there is no final judicial action. The same lack of a final order that would prevent Goldberg from directly challenging the magistrate judge's disposition in this court also prevents SIPC from relying on the magistrate judge's order as a defense to Goldberg's motion to declare the judgment satisfied in full. It was SIPC's responsibility, not Goldberg's to obtain final judicial action on its request to revive the judgment.

Rule 72(b), Fed.R.Civ.P., deals *exclusively* with dispositive pretrial motions. No dispositive pretrial motion is at issue here. Reliance upon Rule 72(b) is wholly misplaced; its provisions are properly irrelevant. The Court held in *Peretz*:

> Unlike the provision of the Federal Magistrates Act that we upheld in *Raddatz* [*United States v. Raddatz*, 447 U.S. 667 (1980)], 636(b)(3) contains no express provision for de novo review of a magistrate's rulings during the selection of a jury. This omission however does not alter the result of the constitutional analysis. The statutory provision we upheld in *Raddatz* provided for de novo review only when a party objected to the magistrate's findings or recommendations. See 28 U.S.C. 636(b)(1). Thus *Raddatz* established that, to the extent "de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties." * * * Our decision that the procedure followed in *Raddatz* comported with Article III therefore requires the same conclusions respecting the procedure followed in this case.

Petitioner submits that the procedural conclusions of the Court in *Raddatz* and *Peretz*, require the same conclusion respecting the propriety of the procedure followed by the District Court in this case.

## CONCLUSION

The judgment and order of Court of Appeals, overturning the ruling of the District Court made in response to the motion of Respondent which was made more than two years after the magistrate had ruled, that the magistrate judge's order was invalid offends holdings of this Court, as set forth above. A grant of certiorari is fully justified.

**WHEREFORE**, Petitioners pray that the Court enter its orders granting this petition for certiorari to the Circuit Court of Appeals for the Tenth Circuit, reversing the Order and Judgment of the Court of Appeals for the Tenth Circuit, and granting such other and further relief as to the Court may seem just.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE TENTH CIRCUIT

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No. 01-1179
(D.C. No. 76-M-961)
(D. Colorado)

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SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff - Appellee,

and

SECURITIES AND EXCHANGE COMMISSION;
RALPH M. CLARK, as Trustee for the Liquidation
of Institutional Securities of Colorado, Inc.,
Plaintiffs,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC.;
WILLIAM AXEL BERNHARD,
Defendants,

and

ABRAHAM GOLDBERG,
Defendant - Appellant.

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**FILED**
**United States Court of Appeals**
**Tenth Circuit**
**MAY 30 2002**
**PATRICK FISHER**
**Clerk**

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## ORDER AND JUDGMENT*

Before **HENRY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **BRISCOE**, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant-appellant Abraham Goldberg appeals from the district court's order denying his motion for an order declaring a federal court judgment entered against him in 1978 to be deemed satisfied in full. We reverse and remand.

## FACTS

This case arises out of the liquidation of defendant Institutional Securities of Colorado, Inc. ("Institutional Securities"), a broker-dealer registered with the Securities and Exchange Commission. The liquidation was conducted pursuant to the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78*lll*. On December 13, 1978, the bankruptcy court conducting the liquidation entered judgment ordering Goldberg, president and director of Institutional Securities, to pay the sum of $187,779.38 to plaintiff Ralph M. Clark, trustee for Institutional Securities.

Both Goldberg and Clark appealed from this judgment to the district court. On July 21, 1982, the district court entered an amended judgment, increasing the amount Goldberg owed by $169,600, to a total sum of $357,379.38.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

On May 29, 1998, plaintiff Securities Investor Protection Corporation ("SIPC")[1] filed a motion to revive the December 13, 1978 judgment, which was nearly twenty years old and in danger of expiration. Goldberg objected to revival of the judgment. On November 10, 1998, a United States magistrate judge entered an order reviving the judgment. Neither party sought review or confirmation of the magistrate judge's order from a district court judge.

On February 7, 2001, Goldberg filed his motion to have the judgment against him declared satisfied in full. Goldberg contended that the judgment was no longer enforceable because the judgment creditor had failed to obtain a district court order reviving it within the twenty-year period provided by Colo. R. Civ. P. 54(h). He argued that the magistrate judge lacked authority to revive the judgment.

The district court rejected Goldberg's argument. It found that "the revival motion was appropriately referred to [the magistrate judge] and in the absence of any timely objection to his ruling, the order became final within the twenty-year period provided by Colorado law." Jt. App. at 270.

## ANALYSIS

Authority to revive a federal court judgment is provided by Fed. R. Civ. P. 69(a)[2] and 81(b). Rule 81(b) states that

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[1] In its motion to revive the judgment, SIPC recited that it was the holder of record of the judgment. Jt. App. at 146. Goldberg does not contest this representation.

[2] Rule 69(a) does not expressly discuss the revival of judgments. We have never stated, in a published case, that the rule applies in that context. At least one district court within this circuit, however, has taken this position in a well-reasoned decision. *See McCarthy v. Johnson*, 35 F. Supp. 2d 846, 847 (D. Utah 1997), *aff'd*, No. 98-4003, 1999 WL 46703 (10th Cir. Feb. 3, 1999); *cf. also United States v. Fiorella*, 869 F.2d 1425, 1426 n.5 (11th Cir. 1989) (applying state law in judgment revival case, citing Rule 69(a) for use of state law procedure in execution of judgment proceedings).

relief formerly obtained through a writ of *scire facias* may be obtained by appropriate action or motion under the practice prescribed in the Rules of Civil Procedure. The relief formerly obtained through *scire facias* included the revival of judgments. 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 3134 (2d ed. 1997). Rule 69(a) provides for "proceedings on and in aid of execution . . . in accordance with the practice and procedure of the state in which the district court is held." The revival of the December 13, 1978 judgment is therefore governed by Colorado state practice and procedure concerning the revival of judgments.

Colorado law provides that "[a] revived judgment must be entered within twenty years after the entry of judgment which it revives." *Santarelli v. Santarelli*, 839 P.2d 525, 526 (Colo. Ct. App. 1992). It is the date on which the court acts that is determinative of its jurisdiction to enter a revived judgment; not the date on which a party requests revival. *Mark v. Mark*, 697 P.2d 799, 800 (Colo. App. 1985). "[I]f a court does not enter a reviving judgment within the twenty-year period it loses jurisdiction to do so." *Id.* Moreover, if a judgment is not revived within the twenty-year period, no execution may be had on the judgment and the judgment shall be considered satisfied in full. Colo. Rev. Stat. § 13-52-102(2)(a). Where disputed, the issue of whether a judgment is to be revived is "tried and determined by the court." Colo. R. Civ. P. 54(h).

SIPC did obtain an order purporting to revive the judgment within twenty years of its issue date. The only real issue in this case is whether the magistrate judge had authority to enter that order. If not, the judgment was not properly revived and should be considered satisfied in full. SIPC contends there are two possible sources for the magistrate's authority in this instance: the magistrate's

authority as conferred by statute, and the magistrate's authority derived from waiver.

1. **Statutory Authority**

The statutory authority of a federal magistrate judge is described in 28 U.S.C. § 636. Section 636(b)(1)(A) authorizes a federal district judge to designate a magistrate judge to hear and determine pretrial matters, except for certain dispositive motions listed therein. Section 636(b)(1)(B) authorizes a federal district judge to designate a magistrate judge to conduct evidentiary hearings and submit proposed findings and recommendations in three types of proceedings, none of which is applicable here. Section 636(b)(3) permits the assignment to a magistrate judge of "such additional duties as are not inconsistent with the Constitution and laws of the United States." The magistrate judge's authority to revive a judgment in this case clearly arises, if at all, from § 636(b)(3).[3]

In accordance with § 636(b)(3), Colorado Federal District Court Local Rule 72.3(D) assigns certain post-judgment duties to magistrate judges. This rule provides as follows:

> In civil cases each magistrate judge shall:
>
> [. . .]
>
> **D.** Act on post-judgment matters arising under Fed. R. Civ. P. 69 including:
>
> 1. Issuing writs;
>
> 2. Issuing orders directing funds to be paid into or disbursed from the registry of the court; and

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[3] The record does not contain a specific order from the district court referring the motion for revival of judgment to the magistrate for decision, and we have been unable to locate mention of such an order on the district court docket sheet.

> 3. Holding hearings *and making recommendations to the district judge on substantive issues* including the liability of a party under a writ of garnishment or execution.

(emphasis added).

Thus, the local rule establishing the magistrate judge's powers to address post-judgment matters arising under Rule 69(a) does not permit the magistrate judge to issue final orders on substantive issues.[4] This issue actually has very little bearing on our result in this case. We do not rely on the fact that the magistrate judge purported to issue an "order" rather than a "recommendation." The problem here is not what the order was *called*; it is that the district court never issued an order either adopting, rejecting, or modifying the magistrate judge's disposition. *See* Fed. R. Civ. P. 72(b). Whether a judgment should be revived is certainly a substantive issue. We conclude that the magistrate judge lacked authority to enter a final order reviving the judgment. *Cf. Colo. Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co.*, 879 F.2d 809, 810-11 (10th Cir. 1989) (holding that § 636(b)(3) and predecessor Colorado federal district court local rule did not give magistrate judge authority to issue final order resolving claims between competing creditors).

2. **Authority conferred by waiver**

In its appellate brief and through a motion to dismiss this appeal, SIPC has advanced an alternative argument: that Goldberg waived appellate review of the magistrate judge's

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[4] In considering this issue, we are faced with an ambiguity in the record. While the magistrate judge's order is captioned an "order," and purports to order the revival of the judgment, the accompanying certificate of service describes it as a "recommendation." Jt. App. at 172-73. The district court docket sheet describes the document entered as an "order," as does the district court's order denying Goldberg's motion.

order by failing to make timely objections to it before the district court. There are two problems with this argument. First, Goldberg has not appealed from the magistrate judge's order reviving the judgment. He has appealed from the district court's order denying his motion to declare the judgment satisfied in full. We have jurisdiction over this final order of the district court. *See* 28 U.S.C. § 1291.

Second, Goldberg's failure to seek review of the magistrate judge's order pursuant to Fed. R. Civ. P. 72 did not create a final, binding order reviving the judgment in this case. We recognize that a party can waive his right to have a matter determined by an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 936-39 (1991); *Clark v. Poulton*, 963 F.2d 1361, 1367 (10th Cir. 1992). Where the district court has not acted to adopt, reject or modify a magistrate judge's recommendation or non-final order under Rule 72(b), however, the result is simply that there is no final judicial action. *See Conetta v. Nat'l Hair Care Centers, Inc.*, 236 F.3d 67, 73 (1st Cir. 2001). The same lack of a final order that would prevent Goldberg from directly challenging the magistrate judge's disposition in this court also prevents SIPC from relying on the magistrate judge's order as a defense to Goldberg's motion to declare the judgment satisfied in full. It was SIPC's responsibility, not Goldberg's, to obtain final judicial action on its request to revive the judgment.

3. **Effect of amended judgment**

In seeking revival of the judgment, SIPC noted an alternative argument: that the amendment of the judgment against Goldberg on July 21, 1982, had extended the twenty-year period for revival until July 21, 2002. That argument was not expressly considered by the district court, and

factual issues pertinent to its resolution remain.[5] Therefore, we decline to address the issue for the first time on appeal, other than to note that it may provide SIPC with an extended period of time in which to seek revival of the judgment through an appropriate, final order on remand.

REVERSED and REMANDED for further proceedings in accordance with this order and judgment. SIPC's motion to dismiss this appeal is DENIED. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

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[5] There are contradictory indications in the record concerning whether the amendment was intended to operate nunc pro tunc, for example. *Compare* Jt. App. at 136-37, 142, *with id.* 144-45.

## APPENDIX B

**In the United States District Court**
**for the District of Colorado**
**Judge Richard P. Matsch**

---

**Civil Action No. 76-M-961**

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SECURITIES INVESTOR PROTECTION CORPORATION,
Applicant,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC.
Defendant.

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SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC., et. al.,
Defendants.

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**FILED**
**United States District Court**
**Denver, Colorado**
**MAR 8 2001**
**James R. Manspeaker, Clerk**

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## ORDER DENYING MOTION OF DEFENDANT ABRAHAM B. GOLDBERG FOR ORDER DECLARING JUDGMENT TO BE DEEMED SATISFIED IN FULL

On February 7, 2001, defendant Abraham B. Goldberg filed a motion for order declaring judgment to be deemed satisfied in full with accompanying documents and brief. The plaintiff Securities Investor Protection Corporation filed its response on

February 21, 2001, with accompanying papers. Upon a review of these papers, the court finds that after a notice and hearing, United States Magistrate Judge Bruce D. Pringle, on November 10, 1998 entered an order on the motion of Securities Investor Protection Corporation for revival of judgment and that the order was entered on the civil docket by the Clerk of this court on the same date. The grounds asserted for the motion are that the magistrate judge under the Federal Magistrate's Act did not have the authority to enter that order and no order of revival was signed by a United States District Judge and entered on the docket by the Clerk. It is clear from the record that United States Magistrate Judge Bruce D. Pringle complied with the requirements of Rule 54(h) of the Colorado Rules of Civil Procedure. Accordingly, the only issue is his authority to enter the final order. Pursuant to 28 U.S.C. § 636(b), Fed.R.Civ.P. 72 and D.C.COLO.L.R. 72, the revival motion was appropriately referred to Magistrate Judge Pringle and in the absence of any timely objection to his ruling, the order became final within the twenty-year period provided by Colorado law. Accordingly, it is

ORDERED that the revival of judgment is valid, the judgment remains in full force and effect and the motion for an order declaring the judgment to be deemed satisfied in full is denied.

Dated: March 8, 2001.

BY THE COURT:

/s/ Richard P. Matsch

Richard P. Matsch, Judge

[Certificate of Service Omitted in Printing]

## APPENDIX C

**In the United States District Court**
**for the District of Colorado**

**Civil Action No. 76-M-961**

---

SECURITIES INVESTOR PROTECTION CORPORATION,
Applicant,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC.
Defendant.

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SECURITIES & EXCHANGE COMMISSION,
Plaintiff,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC., et. al.,
Defendants.

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**FILED**
**United States District Court**
**Denver, Colorado**
**NOV 10 1998**
**James R. Manspeaker, Clerk**

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**ORDER**

*THIS MATTER* having come before the Court upon the MOTION OF SECURITIES INVESTOR PROTECTION CORPORATION FOR REVIVAL OF JUDGMENT as provided by 54(h), Colo.R.Civ.P. to revive the judgment entered on December 13, 1978 and amended July 21, 1982 in this action, and it further appearing that notice of said motion was duly given to the defendant.

*IT IS HEREBY ORDERED* that the MOTION OF SECURITIES INVESTOR PROTECTION CORPORATION FOR REVIVAL OF JUDGMENT be, and hereby is, GRANTED, and the judgement rendered in this action on December 13, 1978 and amended July 21, 1982 is hereby REVIVED with the like force and effect as if rendered upon this date.

DATED at Denver, Colorado, this 10th day of November, 1998.

BY THE COURT:

/s/ Bruce D. Pringle
BRUCE D. PRINGLE
United States Magistrate Judge

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-1179

SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff - Appellee,

and

SECURITIES AND EXCHANGE COMMISSION;
RALPH M. CLARK, as Trustee for the Liquidation of Institutional Securities of Colorado, Inc.,
Plaintiffs,

v.

INSTITUTIONAL SECURITIES OF COLORADO, INC.;
WILLIAM AXEL BERNHARD,
Defendants,

and

ABRAHAM GOLDBERG,
Defendant - Appellant.

ORDER
Filed June 21, 2002

Before HENRY, Circuit Judge, BRORBY, Senior Circuit Judge, and BRISCOE, Circuit Judge.

Appellee's petition for panel rehearing is denied.

Entered for the Court
PATRICK FISHER-Clerk of Court

by: /s/ Karen Phillips
Deputy Clerk

# APPENDIX E

## STATUTES AND RULES INVOLVED IN THIS CASE

### 1. FEDERAL MAGISTRATES ACT, 28 U.S.C. §636(a) and (b):

Sec. 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment -

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b) (1) Notwithstanding any provision of law to the contrary-

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to

dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge

to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

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## RULE 72. FEDERAL RULES OF CIVIL PROCEDURE:

Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific,

written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

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## COLORADO RULES OF CIVIL PROCEDURE

### Rule 54(h), Colo.R.Civ.P.

(h) Revival of Judgments. A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within ten days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 4. If the judgment debtor answer, any issue so presented shall be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

## Colo. Rev. Stat. 13-52-102(2)(a)

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(2) (a) In case the party in whose favor any such judgment has been entered is restrained by an injunction or order of any court, either from issuing execution or selling thereon and has filed for record in the office of the recorder of the county in which such transcript of judgment has been filed a copy of said injunction or order, duly certified under the seal of the court in which the same was rendered, then, from the time of the filing of such certified copy, the time during which he is so restrained shall not be deemed or considered as any part of said six years. Except as provided in paragraph (b) of this subsection (2), execution may issue on such judgment to enforce the same at any time within twenty years from the entity thereof, but not afterwards, unless revived as provided by law, and, after twenty years from the entry of final judgment in any court of this state, the judgment shall be considered as satisfied in full, unless so revived.

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